Table of Authorities Cited

Cases	Pages
Gen. Electric Co. v. Wabash Co. (1938), 304 U.S. 364	6
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1007

HARRY P. LOCKLIN and ELMER J. BRANT, general partners doing business under the firm name of Radiant Color Company,

Petitioners,

vs.

SWITZER BROTHERS, INC., a corporation,

Respondent.

PETITIONERS' REPLY BRIEF

Most respectfully, petitioners urge that the contentions which respondent presents in opposition to the petition should be rejected.

I. Respondent's main point is that the petition should be denied because the appellate court repeatedly decided that the claims fully comply with 35 U.S.C. 112 and this Court previously denied certiorari. This point, raised in respondent's Question 1 and forming the skeleton for most of respondent's argument, lacks merit whether tested by the present record or tested by standards which this Court has previously applied in granting the writ of certiorari.

A. On the merits, respondent plainly errs in urging that the Court of Appeals repeatedly decided that the claims fully comply with the statute. Various permutations of this point are made at pages 3, 4 and 6 of respondent's brief. The words of the Court of Appeals itself prove that respondent is in error.

1. The original opinion shows on its face that the Court of Appeals did, indeed, excuse respondent's failure to specify the critical limits precisely, for the Court of Appeals itself said so (Petition, page 6, citing Appendix 29a-32a). The words which petitioners quoted from the opinion of the Court of Appeals should conclusively answer respondent's argument so far as it relates to the first determination of the Court of Appeals.

2. Respondent's next important milepost is that the Court again decided the issue in connection with petitioners' second petition for rehearing filed in No. 16,780 (Respondent's Brief, pages 2 and 6). Such an argument is based upon the incomplete supplemental record which respondent lodged with the Clerk of this Court. A complete record would have included the request which the Court of Appeals made by the clerk's letter of March 22, 1966, a copy of which is appended to this reply (Appendix, this brief, page 7). This letter instructed counsel to respond to the motion for leave to file the second petition and provided unambiguously that "Such response should be limited to the motion for leave to file, refraining from answering that petition on the merits." The order denied only the motion for leave to file a second petition for rehearing (Appendix, this brief, page 8). None could soundly contend that the denial of the motion for leave to

file constitutes a decision on the merits of the proposed petition. For the convenience of this Court in making the point clear, petitioners submit with this reply nine copies of the motion for leave to file the second petition for rehearing to which respondent has thus alluded.

3. Respondent's next major milestone is that the issue was again decided by the Court of Appeals in its opinion of October 24, 1966 (Respondent's Brief, pages 3, 4 and 6). Here too, the argument is refuted by the words of the Court of Appeals. That court tersely declined to re-examine the original determination that the claims of the Kazenas patent were sufficiently precise (Appendix 73a, quoted Respondent's Brief, pages 3-4). When the court declines to re-examine an issue, it is idle to suggest that it has again decided that issue on the merits.

B. On legal grounds also, respondent urges too much when it argues that certiorari should be denied because the lower courts have time and time again rejected petitioners' contentions on a point presented by the petition. Indeed, the records of this Court are replete with examples of situations where persistence in seeking redress, in this Court and in the lower courts as well, is the only way in which clear error is eventually corrected by this Court. One example is *Shawkee Mfg. Co. v. Hartford Co.* (1944), 322 U.S. 271, in which a decision against Shawkee handed down on January 11, 1934 (68 F.2d 726) was finally vacated by this Court in 1944, despite repeated and unsuccessful efforts of the petitioner to obtain relief from the judgment, all as is historically chronicled in the Court of Appeals' decision (137 F.2d 764, at page 768). Another more dramatic instance is the case of *Sheppard v. Max-*

well (1966), 384 U.S. 333, in which this Court denied certiorari on the original appeal (1956), 352 U.S. 910. In that case, Dr. Sheppard obtained a vacation of the original judgment notwithstanding the persistent refusals of state and federal courts alike to grant him relief following the denial of the original petition.

II. Respondent's next point is that this Court should not grant the writ for the purpose of overturning concurrent fact determinations made by the lower courts (Restated Question 2, argued on page 4 and again on page 5). The cited cases support the proposition as stated, but they are beside the point. Here the petition does not ask this Court to re-examine the record and to redetermine fact issues upon which there are concurrent findings below. The petition makes a particular point of accepting fully the evidentiary facts as set forth on the face of the opinions below and urges that the very facts upon which the courts relied show clear error in the legal conclusions which those courts reached. That, as petitioners understand one of the important interests of this Court, is the basis upon which petitioners seek review. That basis insures that the lower courts will apply uniform legal standards once they have determined the facts. That basis is established on the face of the opinions below and requires no review of evidentiary matters to expose the clear error of the judgments below.

III. Respondent's next major point that the denial of the earlier petition filed in the October Term, 1961, as No. 803, has become the settled law of the case (Respondent's Brief, pages 4-5). Respondent misstates the law. It is to the contrary, as is clearly shown in *Mercer v. Theriot*

(1964), 377 U.S. 152, 153-154; *Kellogg Co. v. Nat. Biscuit Co.* (1938), 305 U.S. 111, 115-116; and *Panama Railroad v. Napier Shipping Co.* (1897), 166 U.S. 280, 283-284 (cited Petition, page 2 and not mentioned in Brief for Respondent). That the doctrine of the law of the case does not apply to the denial of the original petition for the writ is also shown by *Hamilton Shoe Co. v. Wolf Brothers* (1916), 240 U.S. 251, at pages 257-259.

IV. Respondent's next argument is that an admission, that certain earlier adjudicated resins did have an amount of melamine component sufficient to render the product substantially insoluble, refutes petitioners' present argument (Respondent's Brief, pages 6-7). This is nonsense. An illustration should suffice to make the point. One could know, for example, that the City of New Orleans is in Louisiana, yet that would not establish that any person able to make such an admission would be able accurately to place the boundary line between Mississippi and Louisiana, a subject matter which required the attention of this Court in *Mississippi v. Louisiana* (1955), 350 U.S. 5. The difficulty with the claims is not in determining insolubility in a clear-cut case, but the difficulty in determining the metes and bounds, i.e. substantial insolubility, at the precise boundary line separating the claimed invention from the public commons. Here is the indefiniteness of which petitioners complain.

V. Finally, respondent relies, as did the appellate court, on *Minerals Separation, Ltd. v. Hyde* (1916), 242 U.S. 261 (Respondent's Brief, page 7). Petitioners submit that *Minerals Separation* cannot soundly be construed to support the judgments below. In that case, the testing was

not used to determine the metes and bounds of indefinitely stated claim language. Those metes and bounds were definitely set forth with mathematical precision in the claims found valid, whereas this Court held invalid claims 9, 10 and 11 indefinitely calling for "a small quantity of oil." (242 U.S. at page 271 and 250 U.S. 336 at page 339). The testing to which this Court referred had to do with obtaining optimum results within mathematically defined boundary lines. Respondent's argument and the language of the Court of Appeals, upon which the argument is based, emphasize the need for review at this time. They show that the language which this Court used in *Minerals Separation* is susceptible to a construction which this Court could not have anticipated in writing its *Minerals Separation* opinion.

Petitioners submit that the courts below improperly limited the holding of *Gen. Electric Co. v. Wabash Co.* (1938), 304 U.S. 364, improperly expanded the specific reasoning of *Minerals Separation, Ltd. v. Hyde* (1916), 242 U.S. 261, and improperly excused the lack of precision which is required by 35 U.S.C. 112 as interpreted by applicable decisions of this Court. The "recognition by other courts of the correctness of such decisions" (Respondent's Brief, page 7) should not stand. Petitioners submit that their petition should be granted.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,
CARL HOPPE,
Attorney for Petitioners.

(Appendix Follows)

Appendix

March 22, 1966

Flehr and Swain, Esqs.
Attorneys at Law
620 Market Street
San Francisco, California

No. 16780
Harry P. Locklin, et al vs.
Switzer Brothers, Inc.

Dear Sirs:

The Court requests that you respond to Locklin's motion for leave to file a second petition for rehearing, Lodged with the Court on March 11th.

Such response should be limited to the motion for leave to file, refraining from answering that petition on the merits. An original and three copies should be supplied.

Sincerely,
Wm. B. Luck
Clerk

WBL:D
cc:Mr. Hoppe

In the United States Court of Appeals
for the Ninth Circuit

Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, Appellants, vs. Switzer Brothers, Inc., a corporation, Appellee.	No. 16,780

Before: Barnes, Jertberg and Merrill, Circuit Judges

Appellants' motion for leave to file a second petition for rehearing is denied.

Stanley N. Barnes
Gilbert H. Jertberg
Charles M. Merrill

Filed, April 20, 1966,
Wm. B. Luck, Clerk.